Supreme Court, U.S.
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No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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ACTION FOR CHILDREN'S TELEVISION, *et al.*,
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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*Of Counsel:*
SAM ANTAR
CAPITAL CITIES/ABC, INC.
77 West 66th Street
New York, New York 10023

HOWARD F. JAECKEL
CBS INC.
51 West 52nd Street
New York, New York 10019

TIMOTHY B. DYK
(Counsel of Record)
BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
*Counsel for Petitioners and Capital Cities/ABC, Inc. and CBS Inc.*

[Additional Counsel Listed on Inside Front Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

HENRY GELLER
1776 K Street, N.W.
Suite 900
Washington, D.C. 20006
*Counsel for Action for Children's Television*

MARJORIE HEINS
132 West 43rd Street
New York, New York 10036
*Counsel for American Civil Liberties Union*

JAMES POPHAM
1200 18th Street, N.W.
Washington, D.C. 20006
*Counsel for Association of Independent Television Stations, Inc.*

MOLLY PAUKER
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016
*Counsel for Fox Television Stations, Inc.*

BARBARA BURNS
2 Kennedy Boulevard
East Brunswick, N.J. 08816
*Counsel for Greater Media, Inc.*

STEVEN A. LERMAN
DENNIS P. CORBETT
LEVENTHAL, SENTER & LERMAN
2000 K Street, N.W.
Washington, D.C. 20006
*Counsel for Infinity Broadcasting Corporation*

FRITZ E. ATTAWAY
1600 Eye Street, N.W.
Washington, D.C. 20006
*Counsel for Motion Picture Association of America, Inc.*

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
1771 N Street, N.W.
Washington, D.C. 20036
*Counsel for National Association of Broadcasters*

STEPHEN NEVAS
DENISE B. LEARY
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
*Counsel for National Public Radio*

ANDREW JAY SCHWARTZMAN
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

ELLIOT MINCBERG
2000 M Street, N.W.
Washington, D.C. 20036
*Counsel for People for the American Way*

ROBERT BRANSON
3 Constitution Plaza
Hartford, Connecticut 06103
*Counsel for Post-Newsweek Stations, Inc.*

PAULA A. JAMESON
NANCY H. HENDRY
1320 Braddock Place
Alexandria, Virginia 22314
*Counsel for Public Broadcasting Service*

J. LAURENT SCHARFF
REED SMITH SHAW & MCCLAY
1301 K Street, N.W.
Washington, D.C. 20005
*Counsel for Radio-Television News Directors Association*

JANE E. KIRTLEY
1101 Wilson Boulevard
Suite 1910
Arlington, Virginia 22209
*Counsel for The Reporters Committee for Freedom of the Press*

[redacted] W. SANFORD
[redacted] S. HOBERMAN
ROBERT D. LYSTAD
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
*Counsel for Society of Professional Journalists*

## QUESTION PRESENTED

Whether Section 16(a) of the Public Telecommunications Act of 1992, whether standing alone or as limited by the Court of Appeals, violates the First Amendment.

## PARTIES TO THE PROCEEDINGS

The petitioners are Action For Children's Television; American Civil Liberties Union; Association of Independent Television Stations, Inc.; Capital Cities/ABC, Inc.; CBS Inc.; Fox Television Stations, Inc.; Infinity Broadcasting Corporation; Greater Media, Inc.; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Public Radio; People For The American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; and Society of Professional Journalists.

Pursuant to this Court's Rule 29.1, following are the parent companies and subsidiaries (except wholly owned subsidiaries) of those petitioners that are corporations:

Petitioner Fox Television Stations, Inc., is a wholly owned subsidiary of News America Holdings, Inc., and The News Corporation, Ltd. Petitioner Post-Newsweek Stations, Inc., is a wholly owned subsidiary of The Washington Post Company. A minority of the stock of petitioner Capital Cities/ABC, Inc. is owned by Berkshire Hathaway, Inc. A minority of the stock of petitioner CBS Inc. is owned by Loew's Corporation. It has been announced that the Walt Disney Company intends to acquire Capital Cities/ABC, Inc. and that Westinghouse Electric Corporation intends to acquire CBS Inc.

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## PETITION FOR A WRIT OF CERTIORARI

Action for Children's Television, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 58 F.3d 654. It is reprinted at pages 1a-74a of the appendix to this petition. The vacated panel opinion was reported at 11 F.3d 170 and is reprinted at pages 75a-110a of the appendix. The Federal Communications Commission's Report and Order was published at 8 F.C.C.R. 704 and is reprinted at pages 111a-138a of the appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This is a First Amendment challenge to Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954, and the regulation promulgated thereunder, 47 C.F.R. § 73.3999. The statute and regulation seek to enforce the broadcast indecency prohibition contained in 18 U.S.C. § 1464 (1988), *amended by* Pub. L. No. 103-322, 108 Stat. 2147. The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix at 139a-140a.

## STATEMENT OF THE CASE

This case presents important questions concerning the government's authority to regulate "indecent" material in radio and television broadcasts. These questions have not been considered by the Court in the nearly two decades

since its sharply divided decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Specifically, this case concerns the constitutionality of Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, which imposed a 6 a.m.-to-midnight ban on broadcasts of material that the Federal Communications Commission ("FCC") deems "indecent," although not obscene.

The Court of Appeals for the District of Columbia Circuit, after invalidating Section 16(a) in its original panel decision, granted rehearing en banc and generally upheld the statute. The court found Section 16(a) unconstitutional only to the extent that it allowed certain public broadcasters to present "indecent" material beginning at 10 p.m., two hours earlier than all other broadcasters. The court thereupon rewrote the statute to impose a 6 a.m.-to-10 p.m. indecency ban on all broadcasters.

* * * *

Congress and the FCC have periodically sought, under 18 U.S.C. § 1464, to restrict the broadcast of so-called "indecent" material—that is, material that may be considered offensive or sexually suggestive, but that is not obscene, either because it does not appeal to the prurient interest, or because it has serious literary, artistic, political, or scientific merit, or both.

In the mid-1970s, the FCC began to focus its attention on the repeated use of what became known as the "seven dirty words." In *Pacifica*, 438 U.S. 726, this Court affirmed the FCC's ruling that the repeated use of those words in comedian George Carlin's "Filthy Words" monologue was indecent, and that a radio broadcast of the monologue at 2 p.m. on a weekday afternoon violated 18 U.S.C. § 1464. The Court "emphasize[d] the narrowness of [its] holding," making clear that "questions concerning possible action in other contexts were expressly reserved for the future." 438 U.S. at 734, 750. The Court specifically noted that the FCC had not foreclosed the broadcast of similar material during the evening hours. *Id.* at 750 n.28.

In the aftermath of *Pacifica*, the FCC limited its indecency regulation to "the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *In re Infinity Broadcasting Corp.*, 3 F.C.C.R. 930 (1987), *vacated in part sub nom. Action for Children's Television v. FCC* (*"ACT I"*), 852 F.2d 1332 (D.C. Cir. 1988). Broadcasters were permitted to "channel" material containing those words to a "safe harbor" period after 10 p.m. *Id.* In view of the FCC's very restrictive definition of what was "indecent," which had caused the FCC to reject every indecency complaint filed in the years immediately following *Pacifica*, broadcasters did not challenge the extent of the safe harbor.

In 1987, the FCC substantially expanded its regulation of broadcast indecency. *See* Public Notice, 2 F.C.C.R. 2726 (1987). The FCC announced that its indecency enforcement would no longer be limited to the particular words at issue in *Pacifica*. Instead, the FCC would deem "indecent" any "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* at 2726. The FCC indicated that enforcement under this new standard would encompass a wide range of material [1] —including news,[2] informational programs,[3] political ad-

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[1] The FCC did not in each of the following instances find the particular material to be indecent, but it did make clear that these types of programs are not exempt from its indecency regulation.

[2] *See, e.g., KSD-FM*, Notice of Apparent Liability, 6 F.C.C.R. 3689 (1990) ("while the newsworthy nature of broadcast material and its presentation in a serious, newsworthy manner would be relevant contextual considerations in an indecency determination, they are not, in themselves, dispositive factors"); *see also* Report and Order, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704, 709 (1993) ("1993 Report and Order") (noting petitioners' "request to make news and public affairs programs entirely exempt from indecency enforcement" without granting request).

[3] *See, e.g., FCC Investigating; Group W Says Indecency Finding Against KYW-TV Philadelphia Would Be Censorship*, Communica-

vertising,[4] serious drama,[5] motion pictures,[6] musical recordings,[7] and satirical material on political and sociological themes.[8] Although noting that "consideration of context is critical in all indecency cases," the FCC refused to "single [serious merit] out for greater weight or attention" in determining whether material is indecent, or to exempt news and public affairs programs from the reach of the definition. *Infinity*, 3 F.C.C.R. at 932, 937 & n.28. The FCC also limited "indecent" broadcasts to times when there was no "reasonable risk" of children in the audience, a limitation that appeared to cover all hours of the day. 2 F.C.C.R. at 2726.

On reconsideration, the FCC agreed that a safe harbor for "indecent" programs was necessary, but narrowed it to the hours between midnight and 6 a.m. *Infinity*, 3 F.C.C.R. 930. The FCC made clear that its indecency

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tions Daily, Apr. 26, 1993, at 3 (report on FCC investigation of local television program dealing with Philadelphia adult establishment); Letter to Mr. and Mrs. Roland Orie from Chief, Mass Media Bureau (Apr. 7, 1988) (informational program on sex education for teenagers).

[4] *See, e.g.*, Letter to Hon. John E. Bourne, Jr., from Chief, Mass Media Bureau (Apr. 7, 1988) (political advertisement concerning the word "clocksucker" in reference to mayor's desire to purchase clock for City Hall).

[5] *See, e.g., Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (play dealing with AIDS and homosexuality), *reconsideration and clarification granted in part, denied in part sub nom. Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 (1987), *vacated in part and remanded sub nom. ACT I*, 852 F.2d 1332; Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988) (radio presentation of *Ulysses* was not "indecent" because of its considerable duration).

[6] *See, e.g., Kansas City Television, Ltd.*, Order, FCC 88-274 (Aug. 5, 1988) (film *Private Lessons*), *vacated*, 4 F.C.C.R. 6706 (1989).

[7] *See, e.g., KLUC-FM*, Notice of Apparent Liability, 6 F.C.C.R. 3695 (1990) (recording of song "Erotic City" by Prince).

[8] *See, e.g., WLIZ*, Notice of Apparent Liability, 6 F.C.C.R. 3698 (1989) (song parodies satirizing male attitudes toward sexuality).

regulation was designed "to enable parents to decide effectively what material of this kind their children will see or hear." *Id.* at 931.

The Court of Appeals (then-Judge (now-Justice) Ginsburg and Judges Robinson and Sentelle) affirmed in part and reversed in part. *ACT I*, 852 F.2d 1332. Writing for the court, then-Judge Ginsburg recognized that "vagueness is inherent" in the FCC's indecency definition, but concluded that *Pacifica* foreclosed any finding that the definition was unconstitutionally vague. *Id.* at 1339, 1344. The court, however, "welcome[d] correction" of its reading of *Pacifica* from "Higher Authority." *Id.*

The court also held that the FCC's 6 a.m.-to-midnight prohibition on broadcast indecency was unconstitutionally broad. *Id.* at 1340-44. The FCC was obligated to implement a more "reasonable" safe harbor, said the court, in order to "allow scope for the first amendment-shielded freedom and choice of broadcasters and their audiences." *Id.* at 1343 n.18. The court reasoned that "the government's role is to facilitate parental supervision of children's listening," and "[t]hus, the FCC must endeavor to determine what channeling rule will most effectively promote parental—as distinguished from government—control." *Id.* at 1343-44. The court remanded the matter to the FCC to conduct a "full and fair" hearing on the appropriate dimensions of a safe harbor. *Id.* at 1340-44.[9]

Shortly thereafter, Congress directed the FCC to promulgate regulations enforcing a 24-hour-a-day ban on broadcast indecency. Pub. L. No. 100-459, § 608, 102 Stat. 2228. The FCC promptly commenced a new proceeding and implemented the ban. *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 457 (1988). While the

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[9] The court directed the FCC to consider, among other things, whether station- or program-specific audience data could be used in order to better assess whether any "reasonable risk" exists that significant numbers of unsupervised children are in the audience. *See ACT I*, 852 F.2d at 1340-43.

challenge to this new indecency ban was awaiting judicial review, this Court decided *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), which held that a ban on indecent dial-a-porn services violated the First Amendment. The Court of Appeals remanded the challenge to the broadcast indecency ban "in light of . . . *Sable*," again directing the FCC to "conduct a full and fair hearing" to justify its indecency regulation. *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Sept.13, 1989).

In the remand proceeding, petitioners submitted evidence demonstrating that the indecency ban was not a narrowly tailored means of protecting unsupervised children, because most persons under age 18 are in the presence of parents or other adults during many hours of the day. *See* Comments of Action for Children's Television, *et al.*, MM Docket No. 89-494 at 32-33 & Appendix C (Feb. 20, 1990). For example, during the 8 p.m.-to-6 a.m. safe harbor period then being used by the FCC under a stay granted by the Court of Appeals, 98% of all young people are under adult supervision, at school or asleep.

The FCC issued a report in support of its prior conclusion that a complete ban on broadcast indecency was justified. *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297 (1990). The FCC asserted that the government has an independent interest in shielding children from "indecent" broadcasts, even during hours when parents are available to supervise their children's viewing and listening. *Id.* at 5299. The FCC concluded that the ban was "narrowly tailored" because "significant numbers of children are in the audience at all times"—many of whom were not receiving "effective" or "meaningful" supervision, since their parents were not "co-viewing" or "co-listening" with them. *Id.* at 5302, 5305-06.

On review, the Court of Appeals (Chief Judge Mikva, then-Judge (now-Justice) Thomas, and Judge Edwards)

held that the 24-hour-a-day ban could not withstand First Amendment scrutiny, and that some portion of the day must be set aside as a safe harbor for "indecent" programs. *Action for Children's Television v. FCC* ("*ACT II*"), 932 F.2d 1504, 1509-10 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992). The case was yet again remanded to the FCC for a " 'full and fair hearing.' " [10]

On June 2, 1992, during the Senate's consideration of the Public Telecommunications Act, Senator Byrd offered a floor amendment to require the FCC to enforce a 6 a.m.-to-midnight ban on "indecent programming." *See* 138 Cong. Rec. S7308 (daily ed. June 2, 1992). The amendment allowed public broadcasters who sign off the air by midnight to present such programs after 10 p.m. The amendment was adopted by the Senate, and subsequently by the House, without committee consideration or significant floor debate. *Id.* at S7423-24 (daily ed. June 3, 1992); *id.* at H7272 (daily ed. Aug. 4, 1992). When the Public Telecommunications Act was before the House, Representative Dingell, its floor manager, advised his colleagues that "the Byrd amendment is clearly unconstitutional," but nonetheless urged that the entire Act be approved. *Id.* at H7264. The amendment became Section 16(a) of the Act, which President Bush signed into law on August 26, 1992.

The FCC commenced a new rulemaking to implement the ban. In that proceeding, these petitioners pointed to ratings data demonstrating that the ban would deny adult viewers and listeners access to constitutionally protected material. They also directed the FCC's attention to the earlier evidence that virtually no unsupervised children or teenagers are in the broadcast audience during many hours of the day.

On January 22, 1993, the FCC adopted regulations to enforce Section 16(a). Report and Order, *In re Enforce-*

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[10] Again, the Court considered itself constrained by precedent from finding the FCC's definition of indecency to be unconstitutionally vague. 932 F.2d at 1508.

*ment of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704 (1993) ("1993 Report and Order") (App. 111a). In seeking to justify the 6 a.m.-to-midnight ban, the FCC asserted that its interest in regulating indecency was not "restricted to ensuring that parents have an opportunity to supervise their children's listening and viewing," but also encompassed an "independent interest in ensuring the well being of minors." App. 116a.[11] The FCC concluded that the new indecency ban was "narrowly tailored" to serve these interests, relying on the record assembled in the rulemaking on the earlier 24-hour-a-day ban. The FCC reiterated that "significant" numbers of persons under age 18 are in the broadcast audience at all hours. *Id.* at 114a-115a. The FCC then asserted that many such persons are not "effectively supervise[d]" in their exposure to television and radio, because many parents, even when at home, do not watch television or listen to the radio with their children. *Id.* at 133a.

On November 18, 1993, a panel of the Court of Appeals unanimously struck down Section 16(a)'s indecency ban as unconstitutional, explaining that it was not "tailored . . . narrowly" to avoid "unnecessary abridgement of First Amendment rights." *Action for Children's Television v. FCC*, 11 F.3d 170, 183 (D.C. Cir. 1993) (Chief Judge Mikva and Judges Edwards and Wald) (App. 102a). The full court vacated the panel opinion and granted en banc review.

On June 30, 1995, the en banc court issued its decision upholding Section 16(a) in principal part. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (App. 1a). The court, speaking through Judge Buckley, accorded considerable deference to Congress's and the FCC's determinations as to the constitutionality of the new indecency ban, without requiring the

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[11] The FCC also claimed an interest in protecting "the right of all members of the public to be free of indecent material in the privacy of their homes." App. 118a (1993 Report and Order). The Court of Appeals did not rely on this interest.

government to make a factual showing that the indecency ban addresses an actual harm and is narrowly tailored. App. 16a-17a. The Court identified two "compelling" interests served by the indecency ban: first, "supporting parental supervision of children," and second, "shielding them from the influence of indecent broadcasts," which could lead upon "persistent exposure" to "the coarsening of impressionable minds." App. 16a-17a. The court then concluded that the indecency ban was "narrowly tailored" to serve those interests, because "large numbers of children view television or listen to the radio from the early morning until late in the evening." *Id.* at 21a. As for adults' interest in receiving material that might be deemed "indecent," the court noted that some adults remain in the television and radio audience late at night and, in any event, that "adults have alternative means of satisfying their interest in indecent material." *Id.* at 24a.

The court held that Section 16(a) was unconstitutional, however, to the extent that it established an earlier safe harbor for public broadcasters who sign off the air by midnight. App. 30a. The court explained that Congress and the Commission had offered no adequate justification for this differential treatment of certain public broadcasters. *Id.* The court did not strike down Section 16(a) based on this unconstitutionality, but instead effectively rewrote Section 16(a) to allow indecency regulation only between the hours of 6 a.m. and 10 p.m. *Id.* The court signaled to Congress, however, that the indecency safe harbor could begin as late as midnight, so long as it applied to all broadcasters.

Four members of the Court of Appeals dissented. Chief Judge Edwards emphasized that the government had "offer[ed] no evidence that indecent broadcasting harms children," and thus had not justified its "independent" interest in protecting children from such broadcasting. App. 38a (Edwards, J., dissenting). He also noted that the government had not given adequate consideration to less "speech-restrictive" alternatives. *Id.* at 38a, 61a.

Judge Wald, writing for herself and Judges Rogers and Tatel, emphasized that broadcasters and adult audiences need a "meaningful safe harbor," especially in view of the "quite substantial" "chill" caused by the FCC's indecency enforcement activities. App. 66a-67a (Wald, J., dissenting). As a result of the subjective and case-specific nature of the FCC's determinations of what is "indecent," she explained, "broadcasters have next-to-no guidance in making complex judgment calls." *Id.* at 67a. "And even a 'serious' presentation of newsworthy material," she noted, "is emphatically not shielded from liability." *Id.* at 68a.

The FCC's indecency enforcement activities—the ones found by Judge Wald to be so "chill[ing]"—have continued during the pendency of the *ACT* cases. Since 1987, the FCC has issued some 36 indecency forfeiture orders against broadcasters, all of them for material contained in radio programs. *See Action for Children's Television v. FCC* (*"ACT IV"*), 59 F.3d 1249, 1264 (D.C. Cir. 1995) (Tatel, J., dissenting) (also reported as *South Fork Broadcasting Co. v. FCC*). Because these "orders take from two to seven years to get to court, if they get there at all," broadcasters have yet to obtain judicial review of a single FCC determination that a broadcast was "indecent." *Id.* In the meantime, broadcasters who are the subjects of indecency forfeiture orders have faced escalating fines, public condemnation by FCC commissioners, and even the threatened loss of their licenses, all in an effort to pressure them to conform to the FCC's notions of "decency." *Id.*; *see id.* at 1252 (majority opinion) ("agree[ing] that the FCC's implementation of its enforcement scheme is potentially troubling in some respects").[12]

## REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the content-based suppression of indecent, but not obscene, speech—speech that Congress, the FCC, and apparently the majority of the Court of Appeals consider of little

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[12] A separate petition for certiorari will be filed in the *ACT IV* case.

value. Yet, this is speech that broadcasters have a First Amendment interest in presenting, and adult viewers and listeners have a First Amendment interest in receiving. The government's effective prohibition of such speech—by channeling it to hours when it is unavailable to the majority of adults—implicates serious First Amendment concerns. The prohibition encompasses news broadcasts, dramas on subjects such as the AIDS epidemic, and live "talk" shows on radio.[13] It affects the programming decisions that broadcasters make every day at the 11,965 radio stations and 1,542 television stations across the country.[14] It thus affects the material available to tens of millions of adult viewers and listeners, many of whom rely upon the broadcast medium as their principal source of news and entertainment.

The decision below sustaining a 6 a.m.-to-10 p.m. indecency ban cannot be reconciled with decisions of this Court, including its emphatically narrow holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court of Appeals failed to subject Section 16(a) to the rigorous analysis that this Court requires in the First Amendment area. The court did not make the requisite "independent" assessment of the constitutionality of the statute, but instead simply deferred to the assessment of Congress and the FCC. The court did not demand that the government make a factual showing, as this Court has required, that the statute is directed at "real" harms and is narrowly tailored.

The Court of Appeals also misconceived the relevant governmental and First Amendment interests implicated by Section 16(a). The government has no "independent" interest in protecting children from "indecent" material. Nor does the government have any interest in determining

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[13] The court below sought to equate broadcast indecency to "hard-core pornography." App. 11a. There is no evidence in the record that the material that the FCC has deemed "indecent" in the broadcast medium remotely constitutes "hard-core pornography."

[14] News Release, Federal Communications Commission (Sept. 8, 1995).

how parents should supervise their children's television viewing and radio listening. The court also improperly dismissed adult viewers' and listeners' interest in receiving "indecent" broadcasts, relying, contrary to the decisions of this Court, on the supposed availability of similar material in other media.

Finally, in holding that the FCC's definition of "indecency" is not unconstitutionally vague, the Court of Appeals again acted contrary to the decisions of this Court. The issue was not, as the court below held, decided by *Pacifica*. The First Amendment requires that the government provide a clear and precise definition of what speech it seeks to proscribe. Here, given the narrowness of the safe harbor provided by Section 16(a), such precision is particularly important.

## I. IN DEFERRING TO CONGRESS AND FAILING TO REQUIRE EVIDENCE TO SUPPORT THE INDECENCY BAN, THE DECISION BELOW IS IN FUNDAMENTAL CONFLICT WITH DECISIONS OF THIS COURT.

The indecency ban embodied in Section 16(a) is a content-based restriction on speech and, accordingly, may be sustained only if it advances a "compelling interest" by "the least restrictive means." *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Court of Appeals recognized that *Sable* provided the appropriate First Amendment standard under which Section 16(a) was to be scrutinized. App. 9a. However, rather than independently assessing whether the government's ends were compelling and whether the government's means were narrowly tailored, the court deferred to Congress's and the FCC's assessments, without requiring any evidence to support them. As this Court has made clear, such deference is improper in the First Amendment area.

In explaining how courts are to analyze statutes challenged on First Amendment grounds, the Court has articu-

lated two related principles, both of which are critical here:

*First*, a court cannot unquestioningly accept legislative findings on the constitutionality of a statute. Instead, the court has an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion); *accord Sable*, 492 U.S. at 129; *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). "Were it otherwise," as the Court has explained, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *accord Whitney v. California*, 274 U.S. 357, 378-79 (1927) (Brandeis, J. concurring).

Hence, in *Sable*, this Court refused to defer to Congress's assessment that the government's interest in restricting children's access to indecent dial-a-porn would not adequately be served by anything less than a total ban. *See* 492 U.S. at 128. The Court explained that "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.* at 129. The Court ultimately reached its own conclusion—contrary to that of Congress—as to whether the statute was narrowly tailored enough to satisfy the First Amendment. *Id.* at 129-31.

*Second*, a court cannot allow the government to rest on "mere speculation or conjecture" in order to justify a statute restricting speech. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *see Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (courts "may not simply assume that [a statute] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity"). Instead, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a

material degree." *Edenfield*, 113 S. Ct. at 1800; *accord Turner*, 114 S. Ct. at 2470 (plurality opinion).

In *Edenfield*, for example, the Court invalidated a state law that restricted the commercial speech of certified public accountants by prohibiting them from engaging in person-to-person solicitation of prospective clients. The Court acknowledged that the government interests advanced in support of the ban—to prevent fraud or invasion of privacy by CPAs and to assure the independence of CPAs who audit businesses—were "substantial in the abstract." 113 S. Ct. at 1799-1800. But the Court held that the Board had failed to meet its burden of demonstrating that CPAs' solicitation of prospective clients did, in fact, "create[] the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." *Id.* at 1800. The Court stressed that the Board had presented "no studies," or even "any anecdotal evidence," to suggest that CPA soliciation posed these dangers. *Id.*; *see Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995) (noting that "[t]he Government did not offer any convincing evidence" that statute served to advance its interests); *FCC v. League of Women Voters*, 468 U.S. 364, 391 (1984) (rejecting government's asserted interest as "speculative at best").

Here, in sustaining the 6 a.m.-to-10 p.m. indecency ban, the Court of Appeals violated both principles. The court did not exercise its "independent judgment," but instead deferred to the judgment of Congress and the FCC. *Sable*, 492 U.S. at 129. Nor did the court require the government to substantiate its need for an indecency ban as sweeping as that contained in Section 16(a). It simply accepted the government's invitation to engage in "speculation or conjecture" as to whether Section 16(a) is directed at "real" harms and is narrowly tailored. *Edenfield*, 113 S. Ct. at 1800. The court's departure from the approach mandated by this Court is reflected in its treatment of three critical questions.

### A. The Court Failed To Require Proof Of Any Harm To Children From "Indecent" Broadcasts.

The Court of Appeals did not require Congress or the FCC to make *any* factual showing that children suffer psychological harm from exposure to broadcasts that, although "indecent," are not obscene as to either children or adults. Instead, the court held that Congress could simply assume that exposure to indecency might cause "the coarsening of impressionable minds," without supporting such an assumption with "the testimony of psychiatrists and social scientists" or, apparently, anyone else. App. 16a-17a. However, in the absence of any evidence demonstrating that children are, in fact, injured by exposure to "indecent" broadcasts, the court could not properly have concluded that "the harms [the government] recites are real." *Edenfield*, 113 S. Ct. at 1800. The court's analysis was squarely contrary to that employed by this Court in a long line of cases that includes *Edenfield*, *Coors*, and the *Turner* plurality opinion.[18]

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[18] The Court of Appeals asserted on the basis of *Ginsberg v. New York*, 390 U.S. 629 (1968), that "a scientific demonstration of psychological harm is [not] required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." App. 14a. The court's reliance on *Ginsberg* is misplaced for several reasons. First, *Ginsberg* was concerned with material that was obscene, and thus not constitutionally protected, as to minors. No suggestion has been made that "indecent" broadcasts of the sort at issue here are obscene as to either adults or minors. Second, *Ginsberg* predated this Court's decisions in *Landmark*, *Sable*, and other cases that made clear that "'[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'" *Sable*, 492 U.S. at 129 (quoting *Landmark*, 435 U.S. at 843). Third, whereas the statute in *Ginsberg* did not restrict adults' access to the variably obscene publications, Section 16(a) restricts adults' access to "indecent" broadcasts. A stronger showing of harm is required of the government in these circumstances. *See, e.g.*, *Sable*, 492 U.S. at 128 (government must take care not to "reduce the adult population . . . to . . . only what is fit for children") (internal quotations and citations omitted).

The court's failure to demand evidence of any "real," as opposed to merely "speculative," harm from exposure to indecent broadcasts was criticized by the four dissenting judges. As Chief Judge Edwards observed:

> It is easy to assume that there must be ill effects from exposing children, and especially young ones, to indecent material, but Supreme Court doctrine suggests that we must check our assumptions. And with respect to exposure to broadcast indecency and the impact on children, we have yet to unearth any ill effects.

App. 55a-56a (Edwards, J., dissenting). He pointed out that no "evidence of a link between exposure to indecency and harm to children" had been offered by the congressional sponsors of Section 16(a). Judge Wald similarly noted that the record contained "no evidence at all of psychological harm from exposure to indecent programs." App. 73a (Wald, J., dissenting).

Indeed, the record contained substantial evidence to the contrary: a comprehensive analysis of the empirical data on the subject that was prepared by three nationally recognized authorities on the psychological effects of television and radio. These authorities concluded that the existing studies do not show that children are affected at all—much less in a harmful way—by exposure to the material that the FCC has deemed "indecent" in the broadcast context.

### B. The Court Failed To Require Proof Of Children's Exposure To "Indecent" Broadcasts.

The Court of Appeals also failed to require the government to demonstrate that appreciable numbers of children would, in fact, watch or listen to "indecent" broadcasts in the absence of Section 16(a). This showing was also necessary in order to determine, consistent with this Court's authorities, whether "the harms [the government] recites are real." *Edenfield*, 113 S. Ct. at 1800. The reason is obvious: Even if the government's concerns that

children would be harmed by exposure to "indecent" broadcasts were valid in the abstract, no such harm would exist if children were not, in fact, viewing or listening to such broadcasts. *See id.* (government's "abstract" concerns about harm are insufficient to justify restrictions on speech); *accord Turner*, 114 S. Ct. at 2470 (plurality opinion).[16]

Yet, the court allowed the government simply to rely on statistics on the number of children in the overall television and radio audience. *See* App. 22a-23a. These statistics say nothing about how many children—if any at all—would be watching or listening to "indecent" programs if they were available. The court did not, for example, require the government to show that there were any children at all in the audiences of particular programs deemed to be "indecent." Especially given that an 8 p.m.-to-6 a.m. safe harbor has been in effect since 1989—ever since the Court of Appeals stayed the 24-hour-a-day indecency ban in *ACT II*—the government should have been required to provide such information.

The court sought to excuse the absence of data on the number of children in the audience for "indecent" radio or television programs on the supposition that "[c]hildren will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove." *Id.* at 23a. But no data were offered by the government, or otherwise cited by the court, to substitute the court's theory that children would falsely deny watching or listening to such programs.[17]

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[16] The FCC has acknowledged that broadcasters have supplied data in individual indecency enforcement proceedings "demonstrat-[ing] that few or no children were likely to have been listening to their particular station or program when the alleged indecent material was aired." App. 184a (1993 Report and Order).

[17] The court also contended that "children's grazing"—that is, rapidly tuning from station to station—would render station- or program-specific data on children's viewing unreliable. App. 23a. Again, however, the record contains no data establishing that

This absence of any record evidence of children's exposure to "indecent" broadcasts was noted by the dissenters in the Court of Appeals. As Judge Wald pointed out:

> We have not a scintilla of evidence as to how many allegedly indecent programs have been either aired or seen or heard by children inside or outside the safe harbor. Thus, even if the government were allowed to presume harm from mere exposure to indecency, surely it cannot progressively constrict the safe harbor in the absence of *any* indication that the presumed harm is even occurring under the existing regime.

App. 70a (Wald, J., dissenting); *see* App. 61a (Edwards, J., dissenting) ("The Commission presents no program-specific data of what children watch, despite the existence of this data.").

### C. The Court Failed To Require Proof That Section 16(a) Is Narrowly Tailored.

The Court of Appeals also failed to require the government to demonstrate that Section 16(a) is "narrowly drawn" to avoid "unnecessarily interfering with First Amendment freedoms." *Sable*, 492 U.S. at 126 (quotation omitted). Instead, the court expressly stated that "we defer to Congress's determination of where to draw the line" as to which hours to include within the indecency ban. App. 26a.

This was contrary to the "independent judgment" mandated by this Court in *Sable* of "the facts bearing on an issue of constitutional law." 492 U.S. at 129. Indeed, as in *Sable* itself, there were "no legislative findings" that could justify a conclusion that the statute was narrowly tailored. *Id.* Section 16(a), like the ban on indecent

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"grazing," to the extent that it occurs at all among children, results in significant unrecorded exposure to "indecent" programs. *See* App. 73a (Wald, J., dissenting) ("There is no evidence . . . that 'grazing' is leading to any significant viewing of indecency.").

dial-a-porn communications in *Sable*, "was introduced on the floor," and thus was unaccompanied by any "committee report" justifying its breadth and rejecting other alternatives. *Id.* at 130. And as in *Sable*, "[n]o Congressman or Senator purported to present a *considered judgment* with respect to how often or to what extent minors could or would circumvent" a narrower restriction. *Id.* (emphasis added).

The Court of Appeals should have required the government, in accordance with this Court's authorities, to demonstrate why a narrower indecency ban would not suffice. But the court did not demand any such showing. As Chief Judge Edwards noted:

> [T]he Government offers no data on actual parental supervision, parental preferences, or on the effectiveness of parental supervision at different hours of the day and night. . . . Without this kind of data, the Commission's decision to ban indecent broadcasting during the extensive period here in question is not narrowly tailored to serve the asserted interest of facilitating parental supervision.

App. 61a (Edwards, J., dissenting).[18]

The court did not demand any showing that, for example, problems requiring government intervention had arisen during the existing 8 p.m.-to-6 a.m. safe harbor. According to survey evidence submitted in the FCC rulemaking on Section 16(a) and included in the record below, 98% of persons under 18 are with parents or other adults, at school, or asleep during that period. Yet, the court did require the government to show that adult supervision, as opposed to official censorship, was inadequate to shield young people from "indecent" broadcasts

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[18] The Court of Appeals held on two prior occasions that the FCC had to accumulate these sorts of data in order to justify the scope of its indecency regulation. *See ACT II*, 932 F.2d at 1510; *ACT I*, 852 F.2d at 1341-33. The FCC never conducted the "full and fair" hearing directed by those cases.

after 8 p.m. *See* App. 73a (Wald, J., dissenting) ("the government needs to give more careful consideration to those hours in the evening when parental control could reasonably be relied upon in lieu of censorship"). Nor did the court require any showing that adult supervision would not suffice during those hours when children and teenagers are at school.[19] Indeed, the court conceded that "during school hours . . . children are presumably subject to strict adult supervision," but held that the First Amendment did not require "fine tuning" the indecency ban to exclude those hours.[20]

In sum, the decision below conflicts with this Court's decisions directing that statutes suppressing speech be scrutinized independently and rigorously. The Court's intervention is necessary in order to resolve this conflict.

Aside from whether the decision below accords too much deference to Congress with respect to the constitutionality of a broad indecency ban, the Court should consider whether the decision accords too little deference in effectively rewriting Section 16(a), which was a task "properly left to Congress." *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995). After concluding that Section 16(a) was unconstitutional to the extent that certain public broadcasters were allowed to present "indecent" material beginning at 10 p.m., the Court of Appeals did not strike down Section 16(a) as unconstitutional, but instead rewrote the statute to allow all broadcasters to air "indecent" material at 10 p.m. In so doing, the court again acted contrary to this Court's decisions, which have em-

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[19] The survey evidence demonstrated, for example, that more than 99% of all persons under age 18 are with parents or other adults, asleep, or at school throughout the morning "drive-time" hours of 6 a.m. to 10 a.m.

[20] The court also observed that "[t]he Government's concerns, of course, extend to children who are too young to attend school." App. 25a. But no showing was made that parental supervision would be inadequate for such young children.

phasized that the judiciary has no "license . . . to rewrite language enacted by the legislature." *United States v. Albertini*, 472 U.S. 675, 680 (1985); *accord National Treasury Employees Union*, 115 S. Ct. at 1019 & n.26.[21]

## II. THE COURT OF APPEALS' EVALUATION OF THE COMPETING INTERESTS IMPLICATED BY SECTION 16(a) CONFLICTS WITH DECISIONS OF THIS COURT.

In identifying and balancing the competing governmental and private interests implicated by Section 16(a), the decision below departs from the decisions of this Court in three critical respects. Each of these departures warrants this Court's review.

### A. The Court Of Appeals' Recognition Of An Independent Government Interest In Protecting Children From Indecency Conflicts With *Pacifica* And *Ginsberg*.

The Court of Appeals held that Section 16(a) was justified, in part, by "the Government's own interest in the well-being of minors." App. 12a. But such an interest cannot be reconciled with the decisions of this Court.

This Court has repeatedly recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *accord Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This includes parents' ability to decide whether, or when, their children may have access to material on sexual topics. Hence, in *Ginsberg v. New York*, 390 U.S. 629 (1968), which upheld a state statute that prohibited the sale to minors of any publication that was deemed obscene as to them, the Court explained that the statute served to "aid discharge"

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[21] *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986).

of parents' "primary responsibility for children's well-being." *Id.* at 639. The Court emphasized that the statute "does not bar parents who so desire from purchasing the magazines for their children." *Id.*; *accord Bolger v. Youngs Drug Products*, 463 U.S. 60, 74 (1983).

The Court's concededly "narrow[]" decision in *Pacifica*, which held that the FCC could constitutionally regulate a midday broadcast of George Carlin's "Filthy Words" monologue, does not suggest an independent government interest in protecting children. The Court repeatedly noted that the Carlin monologue had been broadcast in the early afternoon—a time when unsupervised children might be expected to be in the audience—and that the FCC had not foreclosed "indecent" broadcasts during the evening hours. *See, e.g.*, 438 U.S. at 729, 732 & n.5, 750 & n.28.

Indeed, Justices Powell and Blackmun, who were essential to the five-member majority, emphasized that the government's "primary concern was to prevent the broadcast from reaching the ears of *unsupervised children* who were likely to be in the audience at that hour." *Id.* at 757 (Powell, J., concurring) (emphasis added). They found guidance in Judge Leventhal's "thoughtful" dissenting opinion in the Court of Appeals. *Id.* & n.1 (citing *Pacifica Foundation v. FCC*, 556 F.2d 9, 32-35 (D.C. Cir. 1977) (Leventhal, J., dissenting), *rev'd*, 438 U.S. 726 (1978)). Judge Leventhal squarely recognized that the government's interest in regulating indecent broadcasts is to give "the family . . . the means to make th[e] choice" whether children are exposed to them. 556 F.2d at 33. He suggested that indecency regulation could not be so easily justified "when the time of broadcast is such that the great preponderance of children are subject to parental control." *Id.* at 36.

There is thus a fundamental inconsistency between this Court's decisions and the decision below with respect to the governmental interest that may justify the FCC's regulation of "indecency" on television and radio.

**B. The Court Of Appeals' Misconception Of The Government's Interest In Aiding Parental Authority Conflicts With This Court's Decisions.**

The court below misconceived the nature of the other governmental interest that it relied upon to justify Section 16(a): the government's interest in "supporting parental supervision of children." App. 17a. As this Court's decisions in *Meyer*, *Pierce*, and *Yoder* recognize, different parents have different approaches to child-rearing. The government's proper interest is in accommodating these varying approaches. It is not in dictating which approach to child-rearing is the proper one for all parents and all children.

The FCC and the court below assumed that there is only one proper way for parents to exert authority over their children's viewing and listening: to remain in the same room with their children while they are watching television or listening to the radio, and thereby to make sure that their children do not switch the dial to a program containing "indecent" material. That assumption is at the heart of the government's rationale for a broad indecency ban and at the heart of the Court of Appeals' decision. The indecency ban is designed to spare parents from engaging in "co-viewing" or "co-listening"—even during hours when they are present in the home—by simply removing "indecent" programs from the airwaves.

The FCC and the court failed to recognize that parental supervision over children's exposure to the broadcast medium may appropriately take many forms. Some parents indeed choose to view or listen with their children. Others install blocking devices on their television sets, or prevent children from having televisions or radios in their own rooms. Others set rules for their children's use of television and radio, without constantly monitoring what programs their children are selecting. There is no basis in the record to conclude that parents cannot engage in meaningful supervision by any of these means during the many hours of the day when they are present

in the home. Nor does *Pacifica* provide any support for such a conclusion. Yet, Congress, the FCC, and the court below have denied parents the opportunity to use these means of supervision—means that leave open the opportunity for adults to watch or listen to "indecent" programs at reasonable hours.

As Chief Judge Edwards noted below, "the FCC has preempted, not facilitated, parental control in enforcing section 16(a)." [22] And "preempt[ing] . . . parental control" is precisely what *Meyer*, *Pierce*, and *Yoder* forbid. The Court should grant review in order to resolve this conflict.

### C. The Court Of Appeals' Heavy Reliance On The Availability Of Indecency In Other Media Conflicts With *Bolger* And *Shad*.

The Court of Appeals acknowledged that Section 16(a) "burden[s] the rights of many adults." App. 24a. Yet, even though the court recognized that Section 16(a) would deprive adults of access to "indecent" material in the broadcast medium, the court nonetheless upheld the statute, because "adults have alternative means of satisfying their interest in indecent material . . . in ways that pose no risk to minors." *Id.* at 24a. The court's reliance on the availability of indecency in other media is contrary to the decisions of this Court.

This Court has recognized on a number of occasions that a content-based restriction on speech cannot be justified on the ground that the same or similar material is available elsewhere. In *Bolger*, for example, the Court rejected the government's argument that a prohibition on the mailing of contraceptive advertisements "does not interfere 'significantly' with free speech because the statute applies only to unsolicited mailings and does not bar other channels of communication." 463 U.S. at 69 n.18. The Court relied on the well-settled principle that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be

[22] App. 55a-56a (Edwards, J., dissenting).

exercised in some other place.'" *Id.* at 69-70 n.18 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) (restrictions on speech cannot be justified merely because "the speaker's listeners could come by his message by some other means"); *Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975).[23]

Not only was the Court of Appeals reliance on adults' "alternative means of satisfying their interest in indecent material" erroneous under this Court's decisions. It was also erroneous as a matter of fact. Much of the material at issue here—news and documentaries, topical "talk" shows, and dramatic and satiric programs—is not readily available in other media. In fact, the FCC's indecency regulation has been directed in recent years almost exclusively at live radio programs, which have no analogue outside the broadcast medium, whether one considers the general program format or the individual program content.

The court's reliance on adults' ability to obtain "indecent" material from non-broadcast sources cannot be justified by *Pacifica*. To be sure, the Court observed in that case that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750 n.28; *see id.* at 760 (Powell, J., concuring). As noted above, unlike the Carlin monologue in *Pacifica*, most of the material that the FCC has deemed "indecent" is not available in other media. More significantly, *Pacifica* did not suggest that adults may effectively be denied "indecent" material on radio and television simply because "indecent" material is available elsewhere. Instead, *Pacifica* emphasized adults' ability to obtain the Carlin monologue and other "inde-

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[23] This principle of First Amendment law has been recognized by other Circuits. *See, e.g., Crowder v. Housing Auth. of City of Atlanta*, 990 F.2d 586, 593 (11th Cir. 1993); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992).

cent" material on television and radio during the evening hours. *See id.* at 750 n.28, 760.[24]

Accordingly, the Court should grant certiorari in order to resolve the conflict between its own decisions and the decision below concerning the governmental and private interests implicated by Section 16(a).

## III. IN HOLDING THAT THE FCC'S DEFINITION OF "INDECENCY" IS NOT UNCONSTITUTIONALLY VAGUE, THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

The Court of Appeals summarily rejected petitioners' vagueness challenge to the FCC's definition of broadcast indecency based on its earlier decision in *ACT I*. App. 8a-9a.[25] The court's decision did not rest on the merits of petitioners' position, but on its view that this Court in *Pacifica* " 'dispelled any vagueness concerns attending the [Commission's] definition.' " *Id.* (quoting *ACT II*, 932 F.2d at 1508); *accord ACT I*, 852 F.2d at 1339. The court's treatment of the vagueness issue reflects a misunderstanding of this Court's authorities.

*Pacifica* was concerned only with the FCC's specific ruling that the Carlin monologue in that case was indecent. The FCC had made clear that it was *not* purporting to articulate a standard of general applicability. *See Pacifica Foundation*, 56 F.C.C.2d 94, 99 (1975). This Court, in turn, made clear that it was not deciding the broader question of the constitutionality of the indecency definition. Justice Stevens, writing for the majority, stated that the FCC's order "was issued in a specific factual con-

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[24] In any event, *Pacifica* predated the Court's decision in *Bolger*, which clarified that a content-based ban on speech cannot be sustained on the ground that "other channels of communication" remain open. 463 U.S. at 69 n.18.

[25] The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." App. 113a n.10 (1993 Report and Order).

text," that "questions concerning possible action in other contexts were expressly reserved for the future," and that the FCC's "specific holding was carefully confined to the monologue 'as broadcast.'" *Pacifica*, 438 U.S. at 734; *see id.* at 742 (the Court's "review is limited to the question whether the Commission has the authority to proscribe this particular broadcast") (plurality opinion). In his separate concurrence, Justice Powell similarly noted that "[t]he Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast.'" *Id.* at 755 (opinion of Powell, J.). He further explained that the Court was not addressing broader questions raised by the FCC's indecency regulation, "consistent with our settled practice of not deciding constitutional issues unnecessarily." *Id.* at 756.

While in the years immediately after *Pacifica*, the FCC provided significant clarity by limiting "indecency" to the words in the Carlin monologue, the FCC's indecency regulation since 1987 has reintroduced confusion. The FCC's orders have been typically conclusory, frequently inconsistent,[26] and generally incapable of providing significant guidance to broadcasters. Moreover, the FCC has instructed that because its indecency orders are "highly fact-specific" and are made "on a case-by-case basis," broadcasters cannot rely on them "unless both the substance of the material they aired *and* the context in which it was broadcast were susbtantially similar." *Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873, 6874 (MMB 1992). As Judge Wald noted below, "conscientious broadcasters and radio and television hosts seeking to steer clear of indecency face the herculean task of predicting on the basis of a series of hazy case-by-case determinations by the Commission which side of the line their program will fall on." App. 67a (Wald, J., dissenting).

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[26] *Compare WCKS Broadcasters, Ltd.*, Notice of Apparent Liability, 9 F.C.C.R. 4871 (MMB 1994) (advertisements that rock radio station "keeps it harder, longer") *with* Letter to Julie Magnell (Oct. 26, 1989) (rejecting complaint concerning song "Slip It In").

This Court has elsewhere demanded that speakers be given clear and precise guidance as to which speech is proscribed so that they do not " 'steer far wider of the unlawful zone' " than necessary. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The Court has repeatedly struck down statutes that sought to regulate sexually explicit speech as unconstitutionally vague. For example, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court held unconstitutional a state law that created a Commission that was to "educate the public concerning [materials] containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." *Id.* at 59. Finding that the law was unconstitutionally vague and that the Commission had done nothing to make it more precise, the Court explained that "[t]he distributor is left to speculate whether the Commission considers his publication obscene or simply harmful to juvenile morality." *Id.* at 71. And in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), the Court summarily vacated and remanded a conviction under a disorderly persons statute that prohibited the use of "offensive," "profane," or "indecent" language in a public place.[27]

The Court has not made clear whether the same vagueness standards apply to the electronic media. The federal courts of appeals are divided on the subject. The Tenth Circuit has upheld a district court's determination that a state statute prohibiting "indecent material" on cable tele-

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[27] *See also, e.g., Brown v. Oklahoma*, 408 U.S. 914 (1972) (summarily vacating and remanding conviction under statute barring "any obscene or lascivious language or word in any public place or in the presence of females"); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (summarily vacating and remanding conviction under breach of peace statute prohibiting wantonly cursing, reviling, or using "obscene or opprobrious language" toward police officers); *Cohen v. California*, 403 U.S. 15, 19 (1971) (statute that prohibited "offensive" speech and conduct did not provide sufficient notice "that certain kinds of otherwise permissible speech or conduct would nevertheless . . . not be tolerated in certain places").

vision was " 'unconstitutionally overbroad and vague.' " *Jones v. Wilkinson*, 800 F.2d 989, 990 (10th Cir. 1986) (per curiam) (quoting *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1117 (D. Utah 1985)), *aff'd mem.*, 480 U.S. 926 (1987). Two circuits have rejected vagueness challenges to the term "indecent" in the federal dial-a-porn statute, relying in significant part on the D.C. Circuit's holding in *ACT I* that *Pacifica* resolved the issue. *See Dial Information Servs. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Information Providers' Coalition for Defense of First Amendment v. FCC*, 928 F.2d 866, 875 (9th Cir. 1991).[28]

The Court should grant certiorari in order to consider whether the FCC's regulation of broadcast indecency, under a definition that the Court of Appeals previously recognized to be "inherent[ly]" vague, *ACT I*, 852 F.2d at 1344, can be reconciled with *Bantam Books* and similar authorities. The Court's resolution of this issue is especially important given the narrow safe harbor sustained by the court below.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

*Of Counsel:*
SAM ANTAR
CAPITAL CITIES/ABC, INC.
77 West 66th Street
New York, New York 10023

HOWARD F. JAECKEL
CBS INC.
51 West 52nd Street
New York, New York 10019

TIMOTHY B. DYK
(Counsel of Record)
BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
*Counsel for Petitioners and Capital Cities/ABC, Inc. and CBS Inc.*

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[28] *See also United States v. Evergreen Media Corp. of Chicago*, 832 F. Supp. 1183, 1187 (N.D. Ill. 1993) (rejecting vagueness challenge to FCC's definition of "indecency" based on *ACT I* and *ACT II*).

HENRY GELLER
1776 K Street, N.W.
Suite 900
Washington, D.C. 20006
*Counsel for Action for Children's Television*

MARJORIE HEINS
132 West 43rd Street
New York, New York 10036
*Counsel for American Civil Liberties Union*

JAMES POPHAM
1200 18th Street, N.W.
Washington, D.C. 20006
*Counsel for Association of Independent Television Stations, Inc.*

MOLLY PAUKER
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016
*Counsel for Fox Television Stations, Inc.*

BARBARA BURNS
2 Kennedy Boulevard
East Brunswick, N.J. 08816
*Counsel for Greater Media, Inc.*

STEVEN A. LERMAN
DENNIS P. CORBETT
LEVENTHAL, SENTER & LERMAN
2000 K Street, N.W.
Washington, D.C. 20006
*Counsel for Infinity Broadcasting Corporation*

FRITZ E. ATTAWAY
1600 Eye Street, N.W.
Washington, D.C. 20006
*Counsel for Motion Picture Association of America, Inc.*

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
1771 N Street, N.W.
Washington, D.C. 20036
*Counsel for National Association of Broadcasters*

STEPHEN NEVAS
DENISE B. LEARY
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
*Counsel for National Public Radio*

ANDREW JAY SCHWARTZMAN
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

ELLIOT MINCBERG
2000 M Street, N.W.
Washington, D.C. 20036
*Counsel for People for the American Way*

ROBERT BRANSON
3 Constitution Plaza
Hartford, Connecticut 06103
*Counsel for Post-Newsweek Stations, Inc.*

PAULA A. JAMESON
NANCY H. HENDRY
1320 Braddock Place
Alexandria, Virginia 22314
*Counsel for Public Broadcasting Service*

J. LAURENT SCHARFF
REED SMITH SHAW & MCCLAY
1301 K Street, N.W.
Washington, D.C. 20005
*Counsel for Radio-Television News Directors Association*

JANE E. KIRTLEY
1101 Wilson Boulevard
Suite 1910
Arlington, Virginia 22209
*Counsel for The Reporters Committee for Freedom of the Press*

BRUCE W. SANFORD
HENRY S. HOBERMAN
ROBERT D. LYSTAD
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
*Counsel for Society of Professional Journalists*